No. _____

In The Supreme Court of the United States

GREG ELOFSON,

Petitioner,

v.

STEPHANIE BIVENS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The DC Circuit summarized the confusion over RICO's venue and process section, 18 U.S.C. § 1965, by writing "There are differing views among our own district judges as well as in our sister circuits regarding the proper interpretation of this language." *Fc Investment Group Lc v. IFX Markets, Ltd.*, 529 F.3d 1087, 1099 (D.C. Cir. 2008). Thus, the question presented is:

1. Does the RICO venue and process statute, 18 U.S.C. § 1965, provide for nationwide service of process under §1965(d), consistent with the Clayton Act and this Court's construction of the 'ends of justice" language in *Standard Oil Co.*, or under §1965(b), as four circuits have held by opting for judicial economy?

The ongoing failure to engage in the early diagnosis of Alzheimer's disease will cost the U.S. government up to $7 trillion. But, the probate courts will order an individual into plenary guardianship based on a mere confirmatory diagnosis of Alzheimer's disease. Given that plenary guardianship is not narrowly tailored, and that the abusive treatment by professional guardians is widely known, the disincentives against early testing of Alzheimer's disease are formidable, and the consequential societal costs promise to be catastrophic. In this light, the question presented is:

2. Whether plenary guardianship executed by reason of a diagnosis of Alzheimer's disease is unconstitutional as applied.

PARTIES TO THE PROCEEDINGS

Petitioner Greg Elofson was the appellant in the court below.

Respondents were appellees in the court below: Stephanie Bivens, Pam Dougherty-Elofson, Stephanie McCollum, Steven Mudd, Lawrence Scaringelli, Paul Theut, Community Memorial Health Systems.

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PETITION FOR WRIT OF CERTIORARI

Greg Elofson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The Ninth Circuit's decision has not yet been published in the Federal Reporter, nor has it been reported or reprinted: *Elofson v. Bivens*, No. 17-16538 (9th Cir. Aug. 8, 2019)(Appendix, A1), Not for Publication. Similarly, the two district court decisions have not been published in the Federal Reporter, nor have they been reported or reprinted: *Elofson v. Bivens*, Case No. 15-cv-05761-BLF (N.D. Cal. Feb. 13, 2017), unpublished (A19), and *Elofson v. McCollum*, Case No. 15-cv-05761-BLF (N.D. Cal. Jul. 6, 2017), unpublished (A5).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 8, 2019.

The Court's jurisdiction is being invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1965 Venue and process provides in relevant part:

(a) Any civil action or proceeding under this chapter against any person *may be instituted* in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that *other parties* residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.
(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to *compel the attendance of witnesses* may be served in any other judicial district. . . .
(d) All *other process* in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

STATEMENT OF THE CASE

1. Factual background: The courts are failing to protect the 1.3 million Americans with $50 billion in assets under guardianship, the Senate Special

Committee on Aging concludes in a new report.[1] "Unscrupulous guardians acting with little oversight have used guardianship proceedings to obtain control of vulnerable individuals and have then used that control to liquidate assets and savings for their own personal benefit," the Committee, led by Maine Senator Susan Collins, asserted in the study, which took a year to complete. Legislative remedies are limited: families most commonly complain that the probate courts ignore the statutes, as in the case at bar. Collateral attacks from the federal courts are routinely dismissed under Rooker Feldman and absolute immunity.

As business model, professional fiduciaries within the probate court system acquire and manage wards as portfolio assets. The time value of money incentivizes them to manage their portfolio assets by following the maxim "isolate, medicate, liquidate (the estate)."

Within this framework, isolating the ward from the family generates litigation, and consequently legal fees that are paid from the estate of the ward. Overmedicating the ward reduces the cost of managing the ward and also alarms the families to engage in even more heightened litigation. Furthermore, selling off the ward's assets as quickly as possible, auctioning a house, for example,

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[1] Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans, United States Senate Special Committee on Aging, November 2018. https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf

provides for speedy liquidation and lowered administrative costs.

Unremarkably, increasing the value of the professional fiduciary's portfolio is done either by adding to the number of wards in the portfolio, or adding wards of very high value. Consequently, asset acquisition is made aggressively amongst the denizens of the probate court. Moreover, like the prisoner's dilemma problem, maximum success for the group is achieved through cooperation instead of competition.

Individuals often fall under the roving eye of the probate court due to family squabbles. For example, in the present matter Defendant Dougherty, with a long history of mental illness, embezzled $74,000 from her step-father, Milo Elofson, to pay off her house in March of 2013, and later tried to force him into a locked-down facility for people with Alzheimer's and dementia.

Petitioner's father Milo brought the matter to his son's attention, asking for urgent help. Petitioner, living in San Francisco, then hired Arizona attorney defendant Bivens who advised an emergency temporary guardianship to provide the authority to keep Milo out of a locked-down facility, until matters could be resolved, and a permanent guardianship to follow.

On August 19, 2013, Defendant Bivens filed the Petition for Emergency Guardianship while Petitioner was still in San Francisco, but unbeknownst to Petitioner, Bivens also filed a forged

and fraudulent Petition for a permanent *dual* Guardianship/Conservatorship against Milo in Petitioner's name, on the same day, against Petitioner's express wishes[2].

On October 9, 2013, the court appointed the Petitioner as Milo's guardian, only, on Bivens' forged and fraudulent Petition.

The probate court commissioner ordered that Milo be placed under plenary guardianship, where under 14-5303(B)(7), the reason given why the appointment of a guardian was necessary, was that "Specifically, the Proposed Ward has been diagnosed with Alzheimer's disease."

Bivens' forged and fraudulent dual appointment petition was the first step in acquiring a new portfolio asset within the probate court. It opened the door to the appointment of a conservator.

On November 21, 2013, Milo's temporary court-appointed-attorney for the guardianship proceeding, defendant Theut, filed a Petition For Appointment of Conservator against Milo Elofson without providing either Milo or Petitioner with statutorily required personal service of process.[3]

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[2] *Barrow v. Hunton,* 99 U.S. 80 (1878), a judgment obtained through forgery is a nullity: "Art. 607 specifies the grounds of nullity relating to the merits -- namely where the judgment has been obtained through fraud, bribery, forgery of documents, &c." *Barrow*, 99 U.S. at 84.

[3] In so failing, Theut violated ARS 14-5405, 16 A.R.S. Rules of Civil Procedure, Rule 4.1 (d), and (g)--resulting in a failure of notice and Void Judgement.

Pursuant to Theut's Petition, on January 16, 2014, at the unnoticed hearing, probate court commissioner Kristin Lemaire ordered that Milo be conserved. Defendants Theut, McCollum – the would-be conservator -- and McCollum's lawyer Scaringelli were present, only. The Elofsons had no notice.

Subsequently, on April 11, 2014, Petitioner filed a motion to set aside and rescind the unnoticed conservatorship hearing and order of January 16, 2014, as statutorily required notice was not provided under ARS 14-5309(A) and (B).

The probate court commissioner denied the motion to set aside and rescind the conservatorship, ruling that Petitioner was practicing law without a license. The probate commissioner warned Petitioner that pursuing the matter would result in him being declared a vexatious litigant.

Between February and October, Scaringelli generated legal fees by filing various sham motions to compel, for example, Petitioner to provide financial data from the bank records held exclusively by the conservator McCollum and to demand that Petitioner be removed as Milo's guardian. Along the way, Petitioner filed a motion for breach of duty, for missing funds and billing violations like seeking remuneration for work done prior to becoming a conservator, and for example charging a $1,200 fee to tow away a classic car, missing checks in the amount of $5,600, and for a Rule 11 violation against Scaringelli for his sham motions on July 27, 2014. All were dismissed for excess page length under local

rules. The probate court commissioner also ordered that Milo could not leave Arizona—without a hearing—at defendant Scaringelli's request.

On October 23, 2014, again at the request of Scaringelli, the probate court commissioner ordered that McCollum, and not the Petitioner who was Milo's guardian, would decide where Milo would live. The day after that, McCollum tried to abduct Milo and force him into a state-run locked-down facility--but failed because McCollum did not bring the correct medical records. Consequently, the Elofsons left Arizona for California.

Later, believing the Elofsons were in California, on January 7, 2015, without required notice of a hearing under ARS 14-5309(A) and (B), and without statutorily required personal service of process, the probate commissioner appointed McCollum to be Milo's guardian on motion from Scaringelli. This completed the acquisition of a new portfolio asset for Defendant McCollum. McCollum was now both guardian and conservator of Milo Elofson.

Matters came to a head in Monterey, California, on January 28, 2015. Petitioner contacted Monterey County Social Services to secure the help of a part-time caregiver for Milo. Because Monterey County Social Services required the last three months of financial records before providing services, on February 2, 2015, Petitioner emailed McCollum to provide the last three months of Milo's bank statements, needed for Milo Elofson to receive Medi-Cal support. McCollum never responded.

Because of McCollum's refusal, Monterey County Social Services contacted Adult Protective Services of Monterey County to compel McCollum to provide the documentation that Milo needed for Medi-Cal support.

According to defendant Mudd's declaration to the district court—given judicial notice without converting Mudd's Rule12(b)(6) to Summary judgment under FRCP Rule 56—Mudd learned of McCollum's refusal to provide financial records needed for Milo's health care on February 13, 2015.

Mudd declared that "McCollum and Scaringelli requested that the police and/or APS take client into protective custody and arrange transport back to Arizona." Notably, McCollum had no jurisdiction or authority in California. California prohibits out of state conservators from having any powers in California under the California Code of Civil Procedure Section 1913(b).

However, in furtherance of McCollum's and Scaringelli's request, on the afternoon of February 13, 2015, Defendant Mudd and six Marina police officers came to the home of Milo and Petitioner, and under the coercive presence of the police, Mudd took Milo away. No court orders or paperwork of any kind were provided, no exigent circumstances were present, no 5150 hold, and Mudd demanded that Petitioner do not follow or try to locate Milo or contact Milo.

Mudd's declaration affirmatively answered the question as to whether he, in conspiracy with

Scaringelli and McCollum, completed all the elements of a *prima facie* case of kidnapping under 18 U.S. Code § 1201(c) and (d) - Kidnapping.

At 11 pm that same night, the floor nurse at Natividad Hospital telephoned Petitioner to say that she had gotten Petitioner's phone number from Milo and that she did not know what Milo was doing in her hospital.

The next day, February 14, 2015, Petitioner had conversations with two local lawyers about the order to not find or contact Milo; both advised to go to the hospital and inquire whether there were any standing orders for Milo. If there were not, they advised, there was nothing to prevent Milo and Petitioner from leaving together. Petitioner followed that advice, found Milo at the Natividad Hospital, inquired as to whether there were any standing orders for Milo. There were none, and Milo and Petitioner left together that evening.

On September 9, 2015, the last time Petitioner saw his father Milo, Milo was in good physical health and quite articulate.

Together, Milo and his son, Petitioner, walked into the Emergency Room at the Community Memorial Hospital, at 2 am, for an examination for Milo because of Milo's strong urge to wander throughout that night.

In the Emergency Room, they asked Milo the following:

Nurse: "Do you know where you are?"
Milo, having always had a dry, British sense of humor, answered: "Masonic Temple."
Nurse: "Do you know what year it is?"
Milo: "1542."
Nurse (pressing on Milo's belly): "Do you feel pain in your belly when I do that?"
Milo: "No, do you feel pain in your arm when you do that?"

The next day, Petitioner explained to the Hospital's social worker that Scaringelli and McCollum had been unwilling to provide financial documentation that would lead to care for Milo through MediCal, and it was needed. They would check and find out.

That afternoon, one Tammy Shields from Community Memorial Hospital's administration telephoned Petitioner to inform him that under HIPPA regulations, they were no longer able to tell Petitioner anything about Milo's whereabouts, prognosis, and medical condition.

Petitioner contacted Adult Protective Services in Los Angeles and Ventura counties, the Ventura County Ombudsperson, Ventura Courthouse legal support, to no avail.

The Community Memorial Hospital, in their written reports, had put Milo Elofson under 24-hour security watch, while Milo was there, and had standing orders to prevent Petitioner from seeing Milo and that Petitioner was not to be allowed on the hospital grounds.

Two weeks later, Scaringelli emailed Petitioner to say that Milo Elofson was in Arizona, that he was very weak, barely able to walk, and had lost significant weight. Scaringelli also wrote that he would not disclose Milo's location.

Petitioner was allowed one phone call with Milo in the subsequent ninth months leading up to Milo's death. Heavily drugged, Milo was able to struggle out a total of four words in a 15-minute phone call with Petitioner: "Greg, is that you?"

Three months before Milo's death, Petitioner saw a portion of Milo's medical reports, and filed an emergency TRO with the Northern District of California on February 22, 2016, to pull Milo out of wherever he was. That medical report showed that Milo had bedsores, did not want to get out of bed--a classic sign of physical and/or sexual abuse--was hospitalized for a kidney infection, an additional sign of neglect, was dehydrated, starving, and was put on medications (Olanzapine) that are black-boxed for patients such as Milo with vascular dementia because it causes stroke, and then taken off of all medications, including palliative care, prior to the planned move to Hospice. The district court ruled that the Rooker Feldman doctrine prevented her from taking jurisdiction of the matter.

Milo died while being held incommunicado on May 22, 2016. People with Alzheimer's ordinarily live between four and eight years following a diagnosis of Alzheimer's disease. Under McCollum's control, Milo died in nine months.

McCollum had Milo's complete medical records sealed for the next 50 years.

McCollum subsequently filed to be Milo's personal representative with the Maricopa County probate court, falsely claiming Milo had no will. With that, she was able to clean out the excess cash that was generated from the auction of Milo's house.

Theut, Scaringelli had previously been sued for racketeering within the last ten years, as had McCollum's employer The Sun Valley Group, where they were responsible for using the guardianship and conservatorship of Marie Long from having a $2M dollar estate into indigence, and Edward Ravenscroft's $600,000 estate into bankruptcy.

2. *District court ruling*: The district court ruled that all federal claims were barred under the Rooker Feldman doctrine, basing the ruling on pre-*Exxon*[4] case law, because ruling on the Federal Claims would undercut the probate court's orders.

The district court followed *Butcher's Union Local No. 498 v. SDC Inv. Inc.*, 788 F.2d 535, 538-539 (9th Cir. 1986) and ruled that jurisdiction could not be found for RICO defendants Bivens, Dougherty, McCollum, Scaringelli, and Theut; "Because the United States District Court for the District of Arizona would have personal jurisdiction over all the alleged

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[4] *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005).

coconspirators, the "ends of justice" provision does not apply.

On the issue of Petitioner's standing to sue on behalf of Milo, the district court ruled that "because Elofson [Petitioner] was not Milo's [guardian] at the time in question [Milo's kidnapping], and did not have legal custody of Milo, he lacks standing to bring a § 1983 claim on Milo's behalf for false imprisonment without due process of law."

Next, on the issue of qualified immunity for defendant Mudd, the district court remained silent on the plain procedural due process violations, where only imminent danger can justify taking a person without court authorization, and ruled that there was no violation of the Petitioner's constitutional rights under a substantive due process "shocks the conscience" standard.

Along the way, the district court ruled that the circumstances surrounding Mudd's kidnapping of Milo were, in sum, so confusing that it would be unclear to Mudd whether he was violating a clearly established constitutional right.

Last, the district court considered moving the case to the Central District of California, as venue for defendant Community Memorial Health Systems lay there. However, the district court decided otherwise because Defendant McCollum had not yet responded to her summons, and McCollum lived in Arizona.

3. Ninth circuit ruling: The Ninth circuit was silent on the Rooker Feldman question presented. On the question of RICO jurisdiction, the Ninth circuit panel affirmed the district court's ruling, writing that "The district court properly rejected Petitioner's argument that RICO confers personal jurisdiction over [the Arizona defendants] because Petitioner failed to allege facts showing "that there is no other district in which a court will have personal jurisdiction over all the alleged coconspirators."

On the question of Standing, and the question of Mudd's qualified immunity, the Ninth circuit ruled that "In concluding that Elofson [Petitioner] lacked standing to bring claims against Mudd on his father's behalf, the district court did not err in taking judicial notice of orders filed by the Arizona probate court. See *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)("A court may take judicial notice of 'matters of public record' without converting a motion to dismiss into a motion for summary judgment."). The record does not support Elofson's [Petitioner's] contention that the district court improperly relied on Mudd's declaration in dismissing the claims." Again, the Ninth circuit overlooked the fact that McCollum's ersatz guardianship, which created the illusion of custody for McCollum, was created without notice.

REASONS FOR GRANTING THE PETITION

I. RICO JURISDICTION

Jurisprudence on the statutory construction of 18 U.S.C. § 1965, which provides Venue and Process for The Racketeer Influenced and Corrupt Organizations Act (RICO), is in a state of disrepair. The DC Circuit summarized the breadth of the problem by writing, "There are differing views among our own district judges as well as in our sister circuits regarding the proper interpretation of this language." *Fc Investment Group Lc v. IFX Markets, Ltd.*, 529 F.3d 1087, 1099 (D.C. Cir. 2008).

With more 1,400 civil RICO cases being filed in 2018, alone, the result of this confusion has been unpredictability, a failure to conform to the Court's treatment of the "ends of justice" clause in *Standard Oil Co. v. United States,* 221 U.S. 1, 46 (1911), and a failure to conform to RICO's liberal construction clause.

A. What is RICO?

The Racketeer Influenced and Corrupt Organizations Act (RICO) is potentially the broadest statute Congress has passed to combat the harmful effects of organized crime. Proscribing certain activities related to racketeering, RICO contains an array of potent criminal sanctions and civil and antitrust-type remedies.

B. Statutory Background

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)[5] in 1970 to "provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[6] RICO is not limited to 'Just mobsters"; it applies in other contexts as well.[7]

To strengthen RICO's effectiveness, Congress included a unique liberal construction clause,[8] in the RICO statutory scheme mandating that "the provisions of this title shall be liberally construed to effectuate its remedial purposes."[9]

C. RICO Jurisdiction

The purpose of RICO's Venue and Process provisions, 18 U.S.C. § 1965 is the same as in the antitrust context found in 15 U.S.C. § 5: to give the plaintiff a choice of forum and to bring all of the defendants connected to the alleged illegal transaction within a single forum.[10]

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[5] Pub. L. No. 91-452, 84 Stat. 944 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2000)).
[6] *Russello v. United States,* 464 U.S. 16, 26 (1983).
[7] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985).
[8] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. No other statute in the United States Code that imposes criminal penalties has a liberal construction directive.
[9] *Id.*
[10] Benjamin Rolf, "The Ends of Justice Revised: How to Interpret RICO's Procedural Provision," 18 U.S.C. 1965, 80 Notre Dame L. Rev. 1225, 1243 (2005).

RICO's § 1965 (a), § 1965 (b), and § 1965 (d) operate to provide both personal jurisdiction and venue as follows:

Section 1965(d) authorizes national service of process, including summons, and thus personal jurisdiction over any RICO defendant if served in a judicial district in which the defendant "resides, is found, has an agent, or transacts his affairs."

Venue for these defendants must be satisfied by the requirements of the general venue statute or § 1965(a).

Once a RICO defendant is within a court's jurisdiction and venue, § 1965(b) allows a court to serve process on, and be a proper venue for, any other RICO defendant if the claims against the additional defendants are connected to the case against the first defendant.

D. The present Circuit split over RICO Jurisdiction

Today's Circuit split manifests in how § 1965 is used in finding whether a court may take jurisdiction of RICO defendants.

PT United Can Co. Ltd. v. Crown Cork Seal Co., 138 F.3d 65, 70 (2d Cir. 1998) has held that section 1965(b) provides for nationwide service of process only "where personal jurisdiction based on minimum contacts is established as to at least one defendant".

Butcher's Union Local No. 498 v. SDC Inv. Inc., 788 F.2d 535, 538 (9th Cir. 1986) has held that to invoke the 'ends of justice' language under §1965(b) "the court must have personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged coconspirators".

In opposition, *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942-48 (11th Cir. 1997) finds nationwide jurisdiction under § 1965(d), and *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626-27 (4th Cir. 1997) does likewise.

Overall, the Second, Ninth, and Tenth Circuits have determined that § 1965(a) is a personal jurisdiction provision, satisfied by showing "minimum contacts" for a RICO defendant. Section 1965(b) confers nationwide service of process in RICO cases, provided there is *no other district* in which all the RICO defendants can be found.

The Fourth and Eleventh Circuits have held that § 1965(a) is, instead, a venue provision--satisfied by showing that a RICO defendant "resides, is found, has an agent, or transacts his affairs" within a given district. Section 1965(d) is the relevant subsection for nationwide service of process, unrelated to a 'no other district' proscription.

Thus, assuming arguendo 1) ten RICO defendants who live in both New York and Florida, and 2) an eleventh RICO defendant who lives only in Florida.

Under the Ninth circuit's *Butcher's Union*, a New York plaintiff could not bring suit over the RICO defendants in New York, under § 1965(b) – because the eleventh RICO defendant lives in Florida, only, while all eleven can be found in Florida.

Opposite to the Ninth circuit's *Butcher's Union* is *ESAB Group* -- the Fourth circuit's leading RICO jurisdiction case. Under *ESAB Group,* personal jurisdiction would be found through § 1965(d), nationwide service of process, for all eleven defendants. Venue would be laid for the ten RICO defendants living in New York, and the New York court's jurisdiction would be found for the remaining Florida RICO defendant through §1965(b)'s "ends of justice" provision. The net result is that our hypothetical New York plaintiff could bring suit in either New York or Florida.

E. The first Circuit split: The "ends of justice" and "no other district"–

The origin of today's Circuit split began with *Farmers I*, where the court decided that § 1965(b)'s "ends of justice" language could only be applied by a showing that venue could not lay in another forum for all the defendants: "If plaintiff can make a proper showing that the claim arose as to other defendants in this district and that there is no other district in which there is venue over all the defendants, this Court may find that the ends of justice require it to exercise venue over Pennington." *Farmers Bank of State of Del. v. Bell Mtg. Corp.*, 452 F. Supp. 1278, 1281 n.8 (D. Del. 1978).(emphasis added).[11]

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[11] The *Farmers* court acknowledges that § 1965 is a supplemental provision with § 1391, but appears to treat the

Next, in *Farmers II*, the court informally construed the "ends of justice" language in § 1965(b) to authorize choosing only a district with venue that had the largest number of defendants. *Farmers Bk. of State of Delaware v. Bell Mortgage,* 577 F. Supp. 34, 35 (D. Del. 1978).

But this is in opposition to this Court's ruling in *Standard Oil Co.,* wherein the "ends of justice" language simply authorized national service on "other" defendants under § 5 of the Sherman Act. In *Standard Oil Co.* the Court brought all defendants into Missouri where only one of the seventy-one defendant corporations and none of the seven individual defendants were otherwise within the circuit court's (Missouri's) jurisdiction. *Standard Oil Co. v. United States,* 221 U.S. 1, 46 (1911).

The lower court in *Standard Oil Co.* dealt with the "ends of justice" requirement in-depth, writing:

"Congress...did not grant to any of the Circuit Courts the power to select the court in which the [complainant] should institute its suit. If it had done so, each court might have selected another. It left the complainant free to commence its suit in any Circuit Court in which it could find and serve a resident conspirator." *United States v. Standard Oil Co.*, 152 F. 290, 296 (E.D. Mo. 1907).

This argument applies with equal force to RICO, as Congress could have chosen many other ways of allowing national service of process but instead

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venue provisions as mandatory instead of permissive and thus fails to follow the liberal construction clause of RICO.

incorporated the antitrust language presumably knowing how broadly it had been interpreted.

F. The second Circuit split: the Ninth circuit replaced "venue" with "personal jurisdiction" –

The Ninth circuit's *Butcher's Union* thereafter adopted *Farmers'* "no other district" statutory interpretation of § 1965(b). See *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 539 (9th Cir. 1986)(emphasis added). ("the plaintiff must show that there is no other district...)".

Next, *Butcher's Union* further widened the circuit split when it 1) took language from *Farmers* I, 2) alarmingly changed the statutory language in *Farmers* I by replacing the word "venue" with the words "personal jurisdiction", then 3) erroneously attributed the adulterated and disordered mixture of language to *Farmers* II (and RICO § 1965(a)).[12]

To illustrate, *Farmers* I reads as:

"As noted above, 18 U.S.C. § 1965(b) provides that the district court may summon other parties over whom there would *not otherwise be venue* in the district if "it is shown that the ends of justice [so] require. . . ." If plaintiff can make a proper showing that the claim arose as to other defendants in this district, *and that there is no other district in which*

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[12] *Butcher's Union* does not explicitly reference a *Farmers I*, but does explicitly reference a *Farmers II*. This "lost" citation may be one reason for the curious perturbation in the statutory construction.

there is venue over all the defendants, this Court may find that the ends of justice require it to exercise venue over Pennington." *Farmers Bank of State of Del. v. Bell Mtg. Corp.*, 452 F. Supp. 1278, 1281 n.8 (D. Del. 1978).(emphasis added).

Butcher's Union took this *Farmers* I language, replaced "venue" with "personal jurisdiction", an attributed the passage to *Farmers* II, to read as:

"For nationwide service to be imposed under section 1965(b), the court must have *personal jurisdiction* over at least one of the participants in the alleged multidistrict conspiracy and *the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators. See Farmers Bank II,* 577 F. Supp. at 35." *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 539 (9th Cir. 1986)(emphasis added).

Butcher's Union replaced "venue" with "personal jurisdiction" and thus changed the criteria for satisfying 1965(a) from "resides, is found, has an agent, or transacts his affairs," supplemented by § 1391, to "personal jurisdiction."

G. The third Circuit split: 1965(d) was ruled to be invalid for nationwide service of process –

The court in *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 71 (2d Cir. 1998) adopted the "no other district" proscription to § 1965(b) from *Butcher's Union,* adopted the language swap from

"venue" to "personal jurisdiction" from *Butcher's Union*, and then added that § 1965(d) could not provide nationwide service of process.
PT United Can Co. wrote that, after finding no useful guidance in the Congressional Record to aid in construing RICO's § 1965, it decided the four subsections of the statute must be read as a whole, from § 1965(a) to § 1965(d), in order to find the most harmonious reading: "Section 1965 makes sense only if all of its subsections are read together." *Id* at 71.

However, the court in *PT United Can Co.* neglected to review the congressional record for the Clayton Act. *Action Embroidery v. Atlantic Embroidery*, 368 F.3d 1174, 1179 (9th Cir. 2004) found that the sections of the Clayton Act after which § 1965(b) and (d) were mirrored were not written together, by Congress, as a whole, and were not intended to harmonize. *Id* at 1178.

The Clayton Act was originally drafted with only the venue sections ((a) and (b) in the RICO context). Furthermore, as an afterthought, Sections (c) and (d), which we now read in RICO's § 1965(c) and (d), were added to provide service of process to accompany the Venue provisions of § 1965(a) and (b). *Id* at 1178.

"We observed that what would ultimately become the provision for worldwide service of process in Section 12 "was added without debate or objection, with no indication that it was intended to relate, let alone be subject, to the [S]ection's venue provision." *Id.*" *Action Embroidery v. Atlantic Embroidery*, 368 F.3d 1174, 1178 (9th Cir. 2004).

H. The case at bar

Differing from *Butcher's Union* and *PT United Can Co.,* the Fourth and Eleventh Circuits lead to opposite jurisdictional outcome (see *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997), *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942-48 (11th Cir. 1997)).

Under *ESAB Group, Inc*, personal jurisdiction is established for all defendants under § 1965(d) through nationwide service of process. Second, §1965(a) provides the court with venue for McCollum and Scaringelli, as each "transacts his affairs" with Mudd as co-conspirators[13] in kidnapping Milo and furthering their trafficking scheme; additionally, venue lay with Scaringelli and McCollum under the §1391(b)(2) "giving rise to" language, where they injured Petitioner in tort in the Northern District of California. ("The statutory standard for venue focuses not on whether a defendant has made a deliberate contact — a factor relevant in the analysis of personal jurisdiction — but on the location where events occurred." *Bates v. C S Adjusters, Inc.,* 980 F.2d 865, 868 (2d Cir. 1992)).

Section 1965(a) provides the court with venue over Mudd, who "resides in" the district, and for the RICO

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[13] "We recognize that in adopting the co-conspirator venue theory in this Circuit, "it is inevitable that some party will be inconvenienced no matter where the suit is tried." *Wyndham Associates v. Bintliff,* 398 F.2d at 620-621." *Sec. Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1318 (9th Cir. 1985).

predicate act of kidnapping Milo in Monterey, CA. There is no civil suit for federal kidnapping, "But § 1964(c) focuses on the "injur[y]" of any "person," not the legal right to sue of any proper plaintiff for a predicate act. If standing were to be determined by reference to the predicate offenses, a private RICO plaintiff could not allege as predicates many of the acts that constitute the definition of racketeering activity." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 280 (1992).

Having satisfied 1965(a), the remaining RICO defendants may be brought into the Northern District of California for trial.

Under *ESAB Group, Inc*,, RICO's liberal construction clause and *Standard Oil's* "ends of justice", this suit goes forward; under *Butcher's Union*, it does not.

II. UNCONSTITUTIONALITY OF PLENARY GUARDIANSHIPS AND STANDING

When, as here, the absolute power of professional guardians is joined with the absolute immunity of the probate courts[14], under standards of evidence

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[14] Within the scope of protective proceeding in probate courts of limited jurisdiction, performed under the doctrine of *parens patriea*, this Court may change the immunity given commissioners and judges from absolute to qualified immunity. There is no reasonable argument that such commissioners and judges are overwhelmed by a vast body of law, which inevitably leads to error. In allowing only qualified immunity over such highly focused judicial responsibilities, this Court would

that fall beneath those required under the police powers in commitment proceedings[15], the predictable outcomes are a march of injustices like something from the works of *Dumas*, made plain in our Senate Reports[16] on the widespread elder abuse and exploitation under guardianship for people diagnosed with Alzheimer's disease.

For the current U.S. population, the ongoing failure to engage in early diagnosis of Alzheimer's disease will cost the U.S. government up to $7 trillion[17]. Against that backdrop, the probate courts stand ready and willing to place an individual under plenary guardianship based on a confirmatory

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alleviate many of the egregious injuries and injustices that arise from this systemic failure.

[15] The *Addington* Court incorrectly writes "However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." *Addington v. Texas*, 441 U.S. 418, 428-29 (1979). For those under plenary guardianship, families and friends are denied access to a ward of the state, the family has no standing to seek redress, and the ward is not permitted to choose his/her own attorney. In short, there is never again an opportunity for review—far less than for a convicted criminal.

[16] Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans, United States Senate Special Committee on Aging, November 2018. https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf

[17] Michele G. Sullivan. "Early diagnosis of Alzheimer's could save U.S. trillions over time." Clinical Neurology News, March 23, 2018. https://www.mdedge.com/clinicalneurologynews/article/161589/alzheimers-cognition/early-diagnosis-alzheimers-could-save-us

diagnosis of Alzheimer's disease. Given the loss of fundamental Constitutional rights, and the widely known abusive treatment by the probate courts, the disincentives to seek testing for Alzheimer's disease are enormous.

Awaiting that person with a diagnosis of Alzheimer's disease is 1) plenary guardianship, 2) isolation, 3) forced medication, and 4) estate liquidation[18]. For such individuals commonly held in locked-down facilities, physical, emotional, and sexual abuse are common[19]. One needs only look at the Stanford Prison experiment to understand the effects of such institutional power imbalances. Thus, the disincentives for individuals to undergo early testing for Alzheimer's disease are profound, and the public policy outcomes are catastrophic.

As Rep. Claude Pepper noted on guardianship almost 30 years ago, "The typical ward has fewer rights than the typical convicted felon.... [Guardianship] is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty."[20]

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[18] "... far too often, we have heard horror stories of guardians who have abused, neglected or exploited a person subject to guardianship. As our report notes, there are persistent and widespread problems with guardianship arrangements nationwide..." https://www.aging.senate.gov/press-releases/senate-aging-committee-examines-ways-to-strengthen-guardianship-programs

[19] World health organization https://www.who.int/news-room/fact-sheets/detail/elder-abuse

[20] H.R. Doc. No. 100-641, at 4 (1987). Subcomm. on Health and Long-term Care of the House Select Comm. on Aging 100th

The procedural requirements for the plenary guardianship are, at best, executed capriciously: "...[t]he appointment of a guardian or a conservator removes from a person a large part of what it means to be an adult: the ability to make decisions for oneself . . . We terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket.[21] Unsurprisingly, plenary guardianships account for more than ninety percent of all guardianships.[22]

A. The international community is rejecting plenary guardianship

Although guardianship began as a legal vehicle used to protect people whom society considered unable to protect themselves, internationally it has become an outdated infringement on the human rights of persons with disabilities.[23]

At one time, for example, the principles of autonomy and protection were frequently invoked as competing interests. However, today, in relation to patients'

Cong. Abuses in Guardianship of the Elderly and Infirm: A National Disgrace. Prepared Statement of Chairman Claude Pepper.

[21] Utah State Courts Ad Hoc Committee on Probate Law and Procedure, Final Report to the Judicial Council, preface, February 23, 2009, accessed January 24, 2018, https://www.utcourts.gov/committees/adhocprobate/Guardian.Conservator.Report.pdf.

[22] See Pamela B. Teaster et al., "Wards of the State: A National Study of Public Guardianship," 37 STETSON L. REV. 193, 219, 219 n.177 (2007).

[23] http://cardozolawreview.com/wp-content/uploads/2018/08/KANTER.TOLUB_.39.2.pdf, page 560

decision-making rights, for example, the Supreme Court of Canada has consistently treated autonomy (i.e., the right to decide what happens to one's body and life) as a fundamental interest that trumps all others.[24]

Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." As the deliberations that accompanied drafting and passage of the CRPD demonstrated, legal capacity is not only the capacity to *have* rights, but also the capacity to *act on,* or *exercise* those rights which, the Preamble to the CRPD makes clear, includes the right to make one's own decisions.[25]

B. All Fundamental Rights are Lost in Plenary Guardianship

The rights lost in plenary guardianship are all-encompassing; hence the term "civil death" has been applied to those guardianized. These Rights that have no textual support in the language of the Constitution but qualify for heightened judicial protection and include fundamental liberties so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were

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[24] See *Cuthbertson v Rasouli*, 2013 SCC 53, [2013] 3 SCR 341 at para 19 (withdrawal of life support requires patient consent in Ontario).

[25] *In re Guardianship of Dameris L.*, 38 Misc. 3d 570, 579 (N.Y. Surr. Ct. 2012).

sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

These fundamental liberties are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); see also *Griswold v. Connecticut*, 381 U.S. 479, 506 (1965) (White, J., concurring). It is well settled that the state must not infringe fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest, *Reno v. Flores*, 507 U.S. 292, 302 (1993).

The list of rights this Court has actually or impliedly identified as fundamental, and therefore qualified for heightened judicial protection, include the fundamental guarantees of the Bill of Rights as well as the following: freedom of association; the right to participate in the electoral process and to vote; the right to travel interstate; the right to fairness in the criminal process; the right to procedural fairness in regard to claims for governmental deprivations of life, liberty or property; and the right to privacy[26]. The right of privacy has been held to encompass personal decisions relating to marriage, procreation, family relationships, child-rearing and education, contraception and abortion.[27]

For plenary guardianship, the government's infringement of an individual's fundamental rights

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[26] Ronald D. Rotunda John E. Nowak, Treatise on Constitutional Law Section(s) 15.7, at 434-36 (2d ed. 1992).
[27] See *Carey v. Population Servs. Int'l,* 431 U.S. 678, 684-85 (1977).

must fall unless it is narrowly tailored to serve a compelling governmental interest. *Reno v. Flores,* 507 U.S. 292, 302 (1993). That is, even though a governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

C. Arizona's Guardianship statute is not narrowly tailored

Arizona's statutes for keeping individuals "safe" and "secure" are provided under Title 36 - Public Health and Safety § 36-564 Guardianship[28] where, within the present context, an appointment is pursuant to Title 14, Article 3, Guardians of Incapacitated Person. The fundamental rights taken from a newly appointed ward of the state are provided under ARS 14-5312, General powers and duties of a guardian, which reads as "The powers of the guardian include the powers of a parent over an unemancipated child."

Thus, as the parent of an unemancipated child (ward), the guardian will act presumptively in the best interest[29] of the ward[30], and thus will choose

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[28] AZ Rev Stat § 36-564 (2016)

[29] The "Best Interest" guidance for guardians provides little safe or security for the ward. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4114332/ There is limited empirical study of adult guardianship.

with whom the ward can, and cannot, associate[31]. The professional guardian may choose to isolate the ward from their family, as often happens, and move the ward to a locked-down institutional facility, however without the procedural rights and safeguards that are afforded a minor (see *In re Gault*, 387 U.S. 1, 13 (1967).[32] The newly appointed wards can no longer choose to associate with their families.

Here, in depriving the ward of the familial right of association, the State crosses the line. There is no indication of any kind that depriving the ward of the fundamental right of family association serves the government's compelling interest that the ward is made more safe and secure, or serves that compelling interest in the least restrictive way. It is entirely arbitrary and harmful. "...Any infirm person, but especially the aged infirm, should be kept as near to home as possible, where family, friends and familiar surroundings offer the best possible link with his usual life." *Lake v. Cameron*,

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However, in early studies (Alexander & Lewin, 1972; Blenkner, Bloom, Nielson, & Weber, 1974), concerns were raised that guardianship often benefited the guardian more than the ward and could hasten institutionalization for the protected person.

[30] "...there is a presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

[31] "For that reason, "[s]hort of preventing harm to the child," the court considered the best interests of the child to be "insufficient to serve as a compelling state interest overruling a parent's fundamental rights." 137 Wn.2d, at 20, 969 P.2d, at 30." *Troxel*, 530 U.S. 57, 96 (2000).

[32] See *Parham v. J. R.*, 442 U.S. 584, 600 (1979) (liberty interest in avoiding involuntary confinement); *Troxel*, 530 U.S. 57, 89 n.8 (2000).

364 F.2d 657, 661 n.9 (D.C. Cir. 1966). Social separation exacerbates the progression of Alzheimer's disease.[33]

In Milo Elofson's case, he was placed under guardianship because, under ARS 14-5303(B)(7), "Specifically, the Proposed Ward has been diagnosed with Alzheimer's disease." However, this diagnosis provided no insight or guidance as to his functional skills.[34] Still, under the control of McCollum's unlawful guardianship, isolated from his only family, Milo Elofson's health was quickly destroyed and he died in a few short months. Many times, the only thing standing between elder abuse and neglect in care facilities, and the person being warehoused, is the vigilant family member.

D. Arizona fails to observe less restrictive means for ensuring the safety and security of the ward

In those rare cases where family members are a nuisance, the courts already have in place temporary

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[33] Ya-Hsin Hsiao, Chih-Hua Chang, and Po-Wu Gean, "Impact of social relationships on Alzheimer's memory impairment: mechanistic studies," Journal of Biomedical Science, January, 2018, 25: 3; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5764000/

[34] Under ARS 14-5303.(D)(2), Milo's functional impairments were summarized as "I do not believe he can take his medications properly. He has gotten lost walking. Short-term memory consistent with diagnosis." And, Under ARS 14-5303.(D)(3), reporting an analysis of the tasks of daily living Milo was capable of performing without direction or with minimal direction: "Daily and self-help skills are unknown. He maintains his weight. He is in good physical condition."

restraining orders to mitigate against harm—under a procedurally fair process—which is far less restrictive than revoking constitutional rights. Beyond that, there are many statutes and regulations that provide for penalties in the case of any form of elder abuse.[35]

Fundamentally, for someone living with Alzheimer's/dementia, "deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection" *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966).

Last, the problems created by revoking the right to family association, aside from those that are obvious, also interfere with finding least restrictive living solutions for a person living with Alzheimer's or other dementia: "...while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

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[35] More broadly, there continues to be an ongoing recognition in case law that guardianship should be narrowly tailored and that the least restrictive approach should be adopted when limiting an individual's control over his/her life. See *In the Matter of Guardianship of Braaten*, 502 N.W.2d 512 (Sup Ct. N.D., 1993), *In the Matter of the Guardianship of Hedin v. Gonzales*, 528 N.W.2d 567 (Sup. Ct. Iowa 1995); *In re the Matter of Boyer*, 636 P.2d. 1085 (Sup. Ct. Iowa, 1981).

In sum, revoking the right to family association does egregious harm and no good. Even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein*, 405 U.S., at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S., at 438. For these reasons, the Arizona guardianship statute is unconstitutional as applied to Milo Elofson.

E. Plenary guardianship as a distant, but dark, memory

Returning to Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD, recognizing that persons with disabilities may require support to exercise their legal capacity, Art. 12(3) requires States Parties to provide access to those supports (see e.g. Robert D. Dinnerstein, Human Rights and the Protection of Persons with Disabilities: Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision Making, 19 Hum. Rts. Br. 8 [2012]).

While the CRPD does not directly affect Arizona's guardianship laws, international adoption of a guarantee of legal capacity for all persons, a guarantee that includes and embraces supported decision making, is entitled to "persuasive weight" in interpreting our own laws and constitutional protections (see e.g. *Lawrence v. Texas,* 539 U.S. 558, 576, 156 L.Ed.2d 508 [2003]; Johanna Kalb, Human

Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellin, 115 Penn. St. L. Rev. 1051, 1059–1060 [2011]).

Relatedly, cases where courts have refused to appoint a 17-A guardian in the first instance also are instructive on this issue. *In Matter of Caitlin* (2017 NYLJ LEXIS 1043), the court, in denying the petition for SCPA 17-A guardianship, stated that, where less restrictive alternatives were available, such as a durable power of attorney, a health care proxy, and community support services, it was not in Caitlin's best interest to have a guardian appointed for her and to have her "decision-making authority supplanted, regardless of good intentions and a desire by [her] family to protect [her]."

F. Plenary guardianship and the effect on Petitioner's Standing

One of the most destructive side effects of plenary guardianship is that families are prevented from bringing suit on behalf of their loved ones when a professional guardian takes over. The person judged to be incapacitated is prevented from securing their own counsel. The professional guardian has "custody," and therefore, as interpreted by the district court in the matter at bar, other family members are barred from bringing suit. Without their family, the ward is left without any avenue of redress in the case of professional guardian's instigated-isolation, aggressive medication, and abuse.

Milo Elofson was not the only one to suffer from the predictable pathologies deriving from the unfortunate juxtaposition of absolute power with absolute immunity in the law. For example, among tens of thousands, Carol Hahn was placed under a temporary guardianship for 30 days, and that temporary guardianship continued, unlawfully for three years[36]. During that time, Carol's family did not have legal standing to sue on Carol's behalf, Carol was isolated for a year, $1M taken from her estate, she was heavily drugged and serially raped by the facility workers at what had become her prison—with no avenue of redress. The legal advice for her daughter, Linda, was that she had to wait until Carol was dead to sue.

A finding by the Court that Milo Elofson's plenary guardianship was unconstitutional reverses the conclusions of the Ninth circuit and the district court that Petitioner did not have standing to sue on Milo's behalf as a result of not having custody of Milo.

While Petitioner argued that he had third-party standing under *Powers v. Ohio*, 499 U.S. 400, 411 (1991) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the fact that the McCollum's

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[36] Guardianship Abuse in California, June, 11, 2012, Linda Kincaid, https://www.blogtalkradio.com/marti-oakley/2012/06/11/ts-radio-linda-kincaid-guardianship-abuse-in-california , and also see Guardianship Abuse: Testimony for the Senate Judiciary Committee https://ppjg.me/2011/10/03/guardianship-abuse-testimony-for-the-senate-judiciary-committee/

custody was Null and Void as an outcome of lack of statutorily required notice of the proceeding to appoint a replacement guardian was unpersuasive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectively submitted,

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